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Conference of the Parties to the United Nations Convention against Transnational Organized Crime

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Liability of legal persons

Liability of legal persons, article 10 of the United Nations Convention against Transnational Organized Crime

Background paper by the Secretariat

I. Introduction

1. At its meeting held in Vienna from 28 to 30 October 2013, the Working Group of Government Experts on Technical Assistance recommended, inter alia, that the United Nations Office on Drugs and Crime (UNODC) expand the knowledge base on legislative and administrative measures to combat transnational organized crime, including by preparing issue papers on provisions of the United Nations Convention against Transnational Organized Crime.[1] The present paper is prepared in furtherance of that recommendation and also integrates the responses by States to the omnibus self-assessment checklist on the Organized Crime Convention.[2]

2. The purpose of the Organized Crime Convention, as stated in its article 1, is to promote cooperation to prevent and combat transnational organized crime more effectively. The Convention seeks to encourage countries that do not yet have provisions against organized crime to adopt comprehensive countermeasures and to provide guidance for States in approaching the legislative and enforcement questions related to countering transnational organized crime. The Convention also seeks to eliminate safe havens for organized criminal groups by promoting greater

* CTOC/COP/WG.2/2014/1.

[1] United Nations, *Treaty Series*, vols. 2225, 2237, 2241 and 2326, No. 39574.

[2] In March 2013, a note verbale (CU 2013/58/DTA/OCB/CSS) was circulated to all Member States, inviting them to transmit to the Secretariat the completed omnibus self-assessment checklist. By 12 May 2014, seven responses, from Bahrain, Armenia, the Russian Federation, the Republic of Korea, Lebanon, Mexico and Ukraine had been received.

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standardization and coordination of national legislative, administrative and enforcement measures in order to ensure a more efficient and effective global effort to prevent and suppress transnational organized crime.

3. Article 10 on the liability of legal persons is an important recognition of the role that legal persons may play in the commission or facilitation of transnational organized crime. According to article 10, paragraph 1, each State party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5 (Criminalization of participation in an organized criminal group), 6 (Criminalization of the laundering of proceeds of crime), 8 (Criminalization of corruption) and 23 (Criminalization of obstruction of justice). In addition, subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative (article 10, para. 2) and such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences (article 10, para. 3). According to paragraph 4 of article 10, each State party shall ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

4. Serious crime is frequently committed through or under the cover of legal entities. Complex corporate structures can effectively hide the true ownership, clients or particular transactions. The concept of legal personality may also be used to shield natural persons from liability, and complex structures may be used to conceal illegal activity. The role of legal persons in illegal activity may span the whole range of organized transnational crimes, from trafficking in persons, drugs or arms to corruption and money-laundering. Ensuring the liability of legal persons is therefore an important component in combating transnational organized crime.[3]

II. Purpose, content and scope of article 10

5. Historically, many jurisdictions did not recognize the criminal liability of legal persons. Civil law jurisdictions, in particular, typically maintained the principle of individual criminal responsibility: *societas delinquere non potest*. Although initially accepted only in common law countries, the criminal liability of legal persons is now recognized, to varying degrees, in different jurisdictions and legal systems. However, while a number of jurisdictions only maintain the principle of individual criminal responsibility and do not recognize the criminal liability of legal persons, they impose civil or administrative liability on legal persons.

6. The considerable movement by States towards recognizing the liability of legal persons has, in part, been driven by the need to comply with a number of international instruments. Relevant legislation under these instruments may therefore provide useful comparisons in implementing legislation under the Organized Crime Convention.

[3] Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, United Nations, New York, 2004, paras. 240-243.

7. There are three categories of offence for which a legal person may be held liable. The first is "serious crimes involving an organized criminal group." A "serious crime" is defined as "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty" (art. 2(b)). The breadth of this provision is therefore limited by the requirement that an organized criminal group be "involved" in the offence.

8. An "organized criminal group" is "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit" (art 2(a)). A "structured group" is a group "that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure" (art. 2(c)).

9. With regard to the definition of "organized criminal group", the Convention does not specify whether the reference to "persons" includes legal persons, leaving the issue to be determined by States parties. While in some jurisdictions there is a presumption that references to "person" includes a legal person, this is not universally the case. In any event, the Convention provides for minimum standards, and this raises the consideration of the importance of ensuring that legal persons are liable for various forms of participation in criminal activity.

10. The second category of offences for which a legal person is to be held liable is those offences established in accordance with the Convention, i.e. offences relating to participation in an organized criminal group (art. 5), laundering of proceeds of crime (art. 6), corruption (art. 8) and obstruction of justice (art. 23). These offences are to be established under domestic law without the need for the offence to be transnational in nature or to involve an organized criminal group, except to the extent required by article 5 (art. 34(2)).

11. The third category of offences applies to those countries which are parties to the Protocols supplementing the Convention. Although not specifically referred to under article 10, article 37, paragraph 4, states that "[a]ny protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol." Further, common article 1, paragraph 2, of the Protocols to the Convention states that, unless otherwise provided, the provisions of the Convention apply, mutatis mutandis, to the Protocols. Therefore article 10 also applies to offences required under those Protocols.

12. While some countries may establish liability of legal persons only for the specific offences required under the Convention or other international instruments, there is a strong argument in favour of addressing the liability of legal persons more broadly within their legal system. Establishing the liability of legal persons for a broader range of offences would facilitate addressing issues of liability, criminal procedure and sanctions and would also help avoid a patchwork of liability and sanctions and the need to update legal provisions as new offences are created. As similar obligations are found in various international instruments, broadening the liability for legal persons may therefore facilitate compliance by States with a range of obligations, rather than on a case-by-case basis. Further, article 34, paragraph 3, provides that States parties may adopt more strict or severe measures for combating transnational organized crime than are provided for under the Convention.

13. As outlined above, some jurisdictions do not recognize the criminal liability of legal persons. To accommodate these different approaches, under article 10, paragraph 2, the liability of legal persons may be criminal, civil or administrative subject to the legal principles of the State party. This is in contrast to natural persons, for whom liability must be criminal, under the Convention.

14. Because legal persons can only act through natural persons, the liability of legal persons is often linked to the conduct of individuals. The question arises as to whether both can be liable for the offence, and whether one can be liable without the other. Article 10, paragraph 3, specifically provides that the liability of legal persons "shall be without prejudice to the criminal liability of the natural persons who have committed the offence." The intent of this provision is to ensure that individuals do not escape criminal liability even where the legal person has been held liable for an offence; that is, the liability of legal persons should not be at the expense of individual criminal responsibility.

III. Issues and challenges in establishing liability of legal persons

15. States parties must first determine to which legal persons liability is to be attached. Although the term "legal person" is not defined in the Convention, it is broadly understood to mean an entity that is recognized by the law as having some of the rights and responsibilities of legal personality. Such entities are also known as "juristic" or "juridical" persons, and may be contrasted with individuals or "natural persons". A common example is a limited liability company which is given a legal status independent of its shareholders through the process of "incorporation". It may sue or be sued, enter into contracts and own property in its own right.

16. While corporations are the dominant form of legal persons, there are many other types of legal persons, including unincorporated associations, trusts, partnerships and trade unions. The forms of legal personality and their status vary considerably between jurisdictions, and careful consideration should be given to the range of entities that may be subject to liability. This is particularly the case where liability is being established for a range of offences, criminal or otherwise.

17. The legal persons for which liability may be established also vary considerably between jurisdictions. Particularly in common law countries, there may be general interpretation provisions which state that references to "person" include, unless the contrary intention appears, bodies corporate and/or other legal persons. In other cases, the scope of the provision is stated in the legislation itself, which may be narrow or broader. In some jurisdictions, for instance, non-profit organizations are excluded from liability.

18. An important consideration in this context is whether the State and other governmental bodies should be subject to criminal liability. Such bodies include local authorities, State-owned corporations and government agencies. It is quite common, particularly in civil law countries, for the State to be expressly excluded from criminal liability, and for local public authorities to have limited liability or to be excluded from criminal liability. It is also possible for legislation to provide for targeted liability by referring to specific government departments which are subject to liability.

19. As mentioned earlier, some jurisdictions do not recognize the criminal liability of legal persons, and article 10 allows States parties to choose the form of liability to be applied, according to their legal principles. These forms of liability are criminal, civil or administrative.

20. These different models of liability reflect different levels of condemnation and procedural protection. Criminal liability reflects the highest level of condemnation that the State can impose. Such offences are typically heard by courts or equivalent bodies, and are subject to the highest levels of procedural protection. Given the seriousness of offences under the Organized Crime Convention, criminal liability could be regarded as appropriate for offences of this nature.

21. For those countries that do not recognize the criminal liability of legal persons, civil or administrative liability can provide an effective alternative. These terms have different meanings in different countries, and are sometimes used interchangeably. "Civil liability" in this context does not relate to civil actions brought under private law. Rather, it refers to penalties imposed by courts or equivalent bodies that do not result in conviction. In some countries "civil penalties" are sometimes available as an alternative to criminal prosecution for conduct involving legal persons. In this case, liability is determined according to the civil standard, in many systems of balance of probabilities, rather than the higher criminal standard, in many systems of beyond reasonable doubt.

22. In many legal systems, administrative liability is imposed by a regulator. In other systems, also courts can impose administrative liability, such as, inter alia, pecuniary sanctions. Administrative liability is used in legal systems where a legal person cannot commit a criminal offence. Some forms of liability provide for a public method of enforcement and the imposition of sanctions, but do not result in a conviction. They may also involve aspects of both civil and criminal procedure.[4] Jurisdictions vary also in the types of offence that can be committed by a legal person. In many common law countries, for instance, there is a general presumption that bodies corporate may be liable for any offence other than those which cannot be committed by an artificial entity. Some jurisdictions specifically extend the liability of legal persons to all offences, while in others, liability is more limited, for example, to offences that violate the duties of the legal person, or enrich or were intended to enrich the legal person. An alternative approach is to list those offences for which a legal person may be liable, which allows for a more limited application of liability to legal persons. Such lists may need to be expanded as new offences are created or in order to comply with international obligations.

23. Although not specifically referred to under article 10, any model of liability may be ineffective if not supported by appropriate investigative and procedural powers.

24. First, the form of liability established for legal persons may have an impact on the relevant agencies and associated powers that are available when prosecuting these entities. It is essential that investigative authorities have the necessary powers

[4] For example, in Germany rules of criminal procedure and investigation apply to the imposition of regulatory fines. Similarly in Italy administrative liability in relation to legal persons is heard by criminal courts applying criminal procedures.

to obtain access to relevant documents held by legal entities, as such documents may often provide evidence as to the commission of the offence.

25. Second, investigative powers may come into conflict with protections that are normally afforded to suspects/defendants. It is therefore necessary to consider whether protections which are developed for the protection of natural persons, should also be available to legal persons. For example, the privilege against self-incrimination is an internationally recognized human right. In some jurisdictions, legal persons are unable to claim this right. This can have a significant impact on the prosecution of legal persons, as it enhances the ability for investigators to demand access to potentially incriminating material.

26. Third, it is necessary to ensure that the rules of trial procedure include an artificial person. For example, as many jurisdictions require the personal presence of the defendant, it may be necessary to establish a provision which enables a legal person to "appear" in the proceedings.

27. A specific procedural issue that is raised in the Organized Crime Convention is that mutual legal assistance must be made available to the "fullest extent possible" for those offences for which a legal person may be liable under article 10 (art. 18, para. 2). This indirectly touches upon the fact that the conduct of legal persons may be transnational. For example, a company incorporated in one jurisdiction may act through a subsidiary or subsidiaries incorporated in other jurisdictions. As mutual legal assistance obligations commonly require "dual criminality", this situation may introduce some complexity where some jurisdictions do not recognize criminal liability in relation to legal persons. In one recent survey of European Union member States, 32 per cent of issuing and 21 per cent of executing States experienced difficulties in relation to mutual assistance due to non-recognition of the criminal liability of legal persons.[5] It is therefore important that States parties ensure that their mutual legal assistance procedures apply equally to legal as well as natural persons.

28. An additional challenge is that of determining the "nationality" of a legal person for the purposes of asserting jurisdiction. As a legal person cannot be extradited, there is arguably a special responsibility on the home jurisdiction to prosecute a legal person within its jurisdiction. This may be particularly significant where jurisdictions will not hear proceedings without the personal "presence" of the defendant. One criterion of jurisdiction in such cases is based on the "nationality" of the legal person. Although there is no universal basis for determining nationality for these purposes, two common measures are the place of incorporation and the principal place of business.

IV. Models of liability for legal persons

29. As outlined above, one of the great challenges in imposing criminal liability on legal persons is the need to attribute responsibility to an artificial entity. Most legal systems base their criminal laws on a combination of physical actions and mental states. As a legal person can only act through individuals, it is necessary to

[5] G. Vermeulen, W. De Bondt, and C. Ryckman, Liability of Legal Persons for Offences in the EU, ICRP-Series Vol. 44 (Maklu, 2012).

develop mechanisms whereby fault can be attributed to the organization. While this can be relatively straightforward in the case of physical conduct, the attribution of mental states such as "intention" or "knowledge" is more complex. Establishing the liability of legal persons should combine the need for effective enforcement with the need to reflect organizational fault. Broadly speaking, two models of liability for legal persons have emerged: the "nominalist" or "derivative" liability and "organizational fault".

A. "Nominalist" or "derivative" liability

30. The nominalist theory of liability states that as a legal person is a legal construct that can only act through individuals, the liability of the entity is therefore dependent upon the liability of individuals. For example, a company may be held liable for a criminal offence committed by an officer or employee of the corporation. Such liability is said to be "derivative" because it links the liability of the legal person to the liability of the individual; it does not seek to find fault in the organization itself.

31. Derivative liability has the advantage of relative simplicity. It fits well within the traditional criminal law model, focusing on the acts and mental states of an individual as a proxy for the fault of the legal entity. However, if fault cannot be established against the relevant individual, then the corporation escapes liability. This is particularly problematic in large organizations where responsibility is diffuse and individual responsibility may be difficult to prove. Such models of liability do not necessarily reflect the fault of the corporation in its own right. Moreover, how broadly is the scope of derivative liability defined? The two main forms of derivative liability are "vicarious liability" and the "attribution" or "identification" model.

1. Vicarious liability

32. The simplest form of derivative liability is "vicarious liability". This is based on the principle *respondeat superior* ("let the principal answer") and renders the legal person liable for the conduct of an individual employee or agent acting within the course or scope of his or her employment/agency. There is no requirement for the employee or agent to be of a certain level of seniority or responsibility; it is sufficient that they were acting within the scope of their employment or agency. Typically, the conduct must also be in part for the benefit of the organization. That is, the organization may not be liable if the employee or agent was acting entirely in their own interest.

33. In many common law jurisdictions, the application of vicarious liability is limited to relatively minor "regulatory" offences, which ensures ease of enforcement for offences that typically do not require a mental state, and which would otherwise be difficult to enforce. While this may not universally be the case, vicarious liability forms the basis for the liability of legal persons in a number of jurisdictions.[6]

[6] In the United States, for example, vicarious liability is imposed on legal persons for federal crimes.

34. The criticism of vicarious liability in the context of serious crime is that it does not necessarily reflect any fault on the part of the organization. It may, in some cases, apply where the organization has endeavoured to stop the offence. This failure to reflect organizational fault may be addressed in other ways. For example, a due diligence defence, discussed in more detail below, allows the organization to prove that it took reasonable steps to prevent the commission of the offence. Another approach is for organizational fault to be taken into account in sentencing. That is, although the legal person is made vicariously liable, the sentence imposed may be reduced if the entity can demonstrate that it took steps to avoid commission of the offence, such as the implementation of effective compliance and ethics programmes.

2. Attribution/identification model

35. An alternative form of derivative liability is the so-called "attribution" or "identification" doctrine. This is similar to vicarious liability in that fault must be found in an individual. However, in contrast to "true" vicarious liability, it is not enough that fault can be found in an employee or agent of the legal person; that person must be of sufficient standing that they may be said to represent the entity. Within common law, this person is referred to as the "directing mind and will" of the company, and it is only the actions of such a person for whom the company will be liable. Applying an "organic" theory of liability, the legal fiction that is adopted is that the company is not vicariously liable for the conduct of another. Rather, because that person *is* the company for these purposes, it is liable in its own right. In this way, it may be said that the principle of personal responsibility is maintained for legal persons. Although this approach makes some effort to reflect organizational fault by focusing on senior employees, the difficulty is in identifying who should represent the legal person for these purposes. Obvious examples include the Board of Directors and other senior officers of a company such as the CEO, managing director, and the like. However, in modern decentralized organizations considerable authority is often vested in "middle-managers". Senior officers of the organization may be remote from the relevant conduct, making it difficult to prove that they have committed a criminal offence. Because liability is derivative, without individual liability the legal person cannot be held liable. This in turn could encourage organizations to be established in such a way as to insulate senior ma agement, and by extension the company, from liability.

36. These challenges are exacerbated by the general view, at least in common law countries, that identification does not allow for aggregation of conduct. That is, liability must be found in one individual; it is not permissible to aggregate the conduct of two or more individuals to determine corporate fault.[7]

37. Some jurisdictions have adopted a more liberal approach, with a focus on the person's actual role within the organization and the purpose of the legislation, rather than relying on formal titles. This approach is found in statutory form, for example, in the Australian federal provisions, which use the term "high managerial agent", defined as "an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body

[7] See e.g. the United Kingdom case R v. HM Coroner for East Kent; Ex parte Spooner (1987) 88 Cr App R 10.

corporate's policy". The advantage of this approach is that it potentially applies to any employee, and applies an objective test of determining whether that person may be said to represent the company. In this case, liability of the legal person is not determined by the official titles, but by the actual role of the natural person within the organization.

38. Variations on the "identification" doctrine are found in a number of jurisdictions. In France, legal persons may be liable for offences committed "on their account by their organs or representatives". Similarly, in Germany, the liability of legal persons depends upon the commission of an offence by certain defined representatives of the organization. The Netherlands adopts a more flexible approach which states that the legal person may be liable for the conduct of an individual where it is "reasonable" in the circumstances. Relevant factors include whether the person was an employee, whether the conduct was part of their ordinary business, whether the organization benefited from the conduct, and the relationship between the criminal conduct and the failure of the organization to take reasonable steps to prevent it.[8]

39. In some jurisdictions, there is a mix of identification and vicarious liability. For example, the corporate entity may be criminally liable both where an offence has been committed for or on its behalf and for its benefit by its legal representatives (identification). In addition, it may also be liable if the offence has been committed for or on its behalf by an employee or agent (vicarious liability).

40. Another model of imputing liability for the conduct of senior personnel is to impose liability where there has been a failure of supervision by those personnel, or where the natural person has acted with the consent or knowledge of the senior person. Such provisions bring in a level of organizational fault by not focusing purely on the acts of senior personnel, but on their failure to supervise and prevent offences.

B. Organizational fault

41. In contrast to nominalist models, "realist" or "organizational" models of liability seek to reflect the culpability of the organization itself, without necessarily needing to focus on individual perpetrators. In this way, the "fault" of the organization may be found in the way in which it is structured, its policies and its failure to supervise its employees or agents. Such models may be combined with other models in order to provide a comprehensive approach to liability.

42. Although some models of liability expressly adopt the organizational fault approach, similar factors regarding the way the fault of the organization can be found, may be taken into consideration in other ways. For example, they might be relevant to the mental element of an offence, such as whether the organization acted recklessly, negligently or may be relevant to a defence of due diligence. They may also be relevant to the decision to prosecute or on sentencing.

[8] Supreme Court of the Netherlands, DSC, October 21, 2003, NJ 2006, 328 (Drijfmest).

1. Corporate culture

43. An example of organizational liability is found in Part 2.5 of Australia's Criminal Code Act 1995. This legislation was drafted as part of a broader review of criminal laws, and adopts a comprehensive approach to criminal liability of legal persons. Before considering the specific feature of "corporate culture", it is worth noting some other features of the legislation. First, the physical element of an offence is attributed to the corporation by vicarious liability. Where the offence is one requiring intention, recklessness or knowledge, then the legal person may be liable if the legal person expressly, tacitly or implicitly authorized or permitted the offence. There are a number of ways in which this can be done.

44. First, if the board of directors or a high managerial agent committed the offence, the legal person can be held liable. This is a more expansive view of the identification doctrine. Second, where the board or a high managerial agent expressly, tacitly or implicitly authorized or permitted the offence, the legal person can be held liable. This reflects a form of organizational liability based on authorization or permission, on the part of the board or in a high managerial agent. Thirdly, the truly innovative aspect of the legislation is that authorization or permission may be demonstrated by proving that:

(a) A corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance; or

(b) The body corporate failed to create and maintain a corporate culture that required compliance.

45. "Corporate culture" is defined to mean "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place". Relevant to the issue of corporate culture is whether a high managerial agent had authorized the commission of the offence or a similar offence, or whether the natural person who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent would have authorized the commission of the offence.

46. The concept of "corporate culture" therefore places the organizational fault of the legal person at the core of questions of liability. Rather than attributing the liability of individuals to the entity, the latter is held liable by virtue of its structure and operation. Further, where negligence is a mental element of the offence, and that mental element cannot be established in an individual, the body corporate may be negligent if its "conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers)." In particular, negligence by the body corporate may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) Inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) Failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

47. Although a sophisticated model of criminal liability of legal persons, it remains to be seen how these provisions will operate in practice. They do, however, serve to illustrate the potential to impose liability based on organizational fault. This

is also reflected in other jurisdictions where the fault of the legal person is based on the manner in which the entity is managed or organized.

2. Failure to act

48. Although a legal person cannot act other than through individuals, it may be argued that it can fail to act in its own right. That is, where a legal person is under a legal obligation to act, its failure to discharge that obligation can be established without finding fault in an individual.[9]

49. In the context of the Organized Crime Convention, this model of liability could be relevant where an obligation is imposed on a legal person. For example, under article 11, paragraph 3, of the Protocol against the Smuggling of Migrants, States parties should establish "the obligation of commercial carriers [...] to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State." This is an example where the failure of the company to discharge this obligation could be determined without reference to an individual person.

50. Such provisions may impose liability simply for a failure to supervise, or they may impose an additional mental element such as intention or gross negligence. Although intention may have to be established through attribution, gross negligence could be proved by considering those steps that the company took or did not take, and comparing them to the conduct of a reasonable corporation.

51. The focus of this paper so far has been on attributing liability to legal persons based on the conduct of natural persons. However, in many cases, legal persons will act through subsidiaries or other related entities. It may therefore be necessary to consider whether one organization may be held liable for their role in the offence of other organizations. For example, the parent company may be held liable for bribery by a subsidiary incorporated in another jurisdiction.

52. In some cases, it may be possible to impose liability on the parent company for being an accessory to the offence, or for conspiring to commit the offence or being part of a criminal association. However, this may be very difficult to prove and an alternative is to impose liability in relation to control of the other entity. That is, where a legal person can be shown to exercise control over another entity, the parent is held liable for the offence of the controlled entity.

V. Defences

53. As with crimes committed by natural persons, defences to liability may be available to legal persons. Of particular significance in this context is the defence of "due diligence". Although not precisely defined, due diligence is, in essence, the opposite of negligence. That is, the defendant may reduce or escape liability if it is able to prove that it took all reasonable steps to ensure compliance with the relevant law. This defence is of particular importance in relation to legal persons as it is a

[9] For example, the Israeli Penal Law provides that "[i]f the offence was committed by way of omission, when the obligation to perform is directly imposed on the body corporate, then it is immaterial whether the offence can or cannot be related also to a certain officer of the body corporate" (art. 4, s. 23(2)(b)).

reflection of organizational fault. Whether or not a legal person endeavoured to comply with the law is reflected in the structure and policies of the organization.

54. The precise content of due diligence varies with the nature of the offence, the circumstances of the offence and the nature of the defendant. Failure to exercise due diligence may be evidenced through, for instance, inadequate corporate management, control or supervision or failure to provide adequate systems for conveying relevant information to relevant persons. The due diligence defence may also involve demonstrating that an effective compliance programme is in place within the entity.

VI. Sanctions

55. Holding legal persons liable may be of limited benefit unless it is accompanied by appropriate sanctions. Article 10, paragraph 4, of the Organized Crime Convention stipulates that there is a need for "effective, proportionate and dissuasive" criminal or non-criminal sanctions. While these are to include monetary sanctions, the article also recognizes the need for effective non-monetary sanctions, which apply regardless of the form of liability adopted.

56. One of the major chalienges for States in establishing criminal liability of legal persons relates to the traditional role of criminal law in imposing "moral" sanctions on offenders. While also concerned with rehabilitation and deterrence, the stigma associated with a criminal conviction is an important feature and justification for imposing criminal liability. Nevertheless, although civil or administrative liability may lack the stigma of a criminal conviction, they may nonetheless produce effective organizational sanctions.

57. As a legal person exists only in law, it cannot suffer moral condemnation or "feel shame". However, this does not mean that effective organizational sanctions cannot be imposed. Appropriate sanctions may deter future offences by the defendant organization ("specific deterrence") and may also deter similar entities from offending ("general deterrence"). More broadly, sanctions may bring about organizational change, and in this way a legal person can be said to have been "rehabilitated".

58. What is "effective" is obviously dependent upon the organization and the circumstances of the offence. Under article 11, paragraph 1, of the Convention, sanctions must also reflect the gravity of the offence. Although this in part relates to the seriousness of the offence itself, it may also reflect the fault of the organization. For example, if the organization has been shown to have acted intentionally, or with criminal negligence, then the sanction imposed may be increased to reflect this.

59. It is important that the legal process of a State be capable of addressing sentencing factors as they apply to organizations.[10] Historically, less attention was paid to the issue of organizational sanctions in many jurisdictions, as the focus typically centred on monetary penalties. Currently, there are a number of examples of innovative sanctions that can be applied to legal persons, found in both national

[10] The United States Sentencing Guidelines, for example, adopt a comprehensive approach to sentencing factors for organizational defendants.

legislation as well as international instruments. Ideally, sanctions against legal persons should be placed in general penal legislation rather than attached to specific offences, as this helps to ensure that the full range of sanctions is available against an organizational defendant.[11] Specific categories of organizational sanctions include:

(a) Monetary penalties;

(b) Forfeiture;

(c) Adverse publicity orders;

(d) Probation;

(e) Disqualification;

(f) Deregistration.

A. Monetary penalties

60. The imposition of a monetary penalty is the most common form of sanction against legal persons. Because the latter are typically used to generate wealth, targeting the financial motive may provide an effective deterrent both for the offending organization and for those who profit from it. Monetary penalties are relatively easy to administer, and return money to the government. They are also readily adapted to differing forms of liability, whether criminal, civil or administrative.[12] The level of fine to be imposed may be set specifically for legal persons or as a multiple of that which is applicable to a natural person. For those offences that are punishable only by imprisonment, it may be necessary to provide a method of converting a term of imprisonment to an equivalent fine.

61. Although in many cases monetary penalties may have the desired deterrent effect, they may also be seen as just a business cost without necessarily bringing about organizational change. On the other hand, the impact of a monetary penalty may also be felt by "innocent" third parties such as employees, shareholders and consumers. The challenge is, therefore, to set the appropriate level of penalty. If the monetary penalty is too low, it may have little impact on the organization and not act as a deterrent to others. If it is too high, the indirect impacts may be too great.

62. One way in which this issue may be addressed is for the fine to be calculated according to the harm caused, the benefit obtained and/or the revenue of the organization. Some jurisdictions, such as Italy, adopt a two-phase process. In the first phase, the court determines the number of "quotas" to be applied, which reflects the gravity of the offence. The second phase involves a determination of the value of those shares, which is based on the company's capacity to pay.

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[11] See also the *Model Legislative Provisions against Organized Crime*, United Nations, New York, 2012.

[12] For example, under s. 30(2) of the German Regulatory Offences Act, differing penalties apply depending on whether the underlying offence was a criminal or a regulatory offence.

B. Forfeiture

63. Although not strictly a sanction, the ability to order the forfeiture of gains incurred as a result of criminal activity can be an important component of an effective justice response. This may be done generally, by ensuring that legal persons fall within proceeds of crime legislation. In addition, a number of jurisdictions make provision for a legal person to be required to return illegally obtained profits, which leads to very substantial penalties.[13]

C. Adverse publicity orders

64. For some legal persons, their reputation and "brand" is of considerable value, a number of jurisdictions rely on the option of advertising the legal person's offence. Adverse publicity orders should be distinguished from corrective advertising, where a defendant is required to publish a corrective statement. To draw the attention to the offending organization may have a significant impact as such targeted advertising may also have an educative effect, making legal persons, their stakeholders and the community aware of the illegality of the relevant conduct. The secondary impact on the personal reputation of senior officers of the organization may also encourage organizational change. Adverse publicity may also help consumers and others to consider whether to deal with the offending organization.

D. Probation

65. A commonly utilized sanction aimed at encouraging or compelling individual offenders to alter their behaviour and to avoid the commission of future offences is to subject that person to a period of court-ordered supervision or "probation". The same principle can be applied to legal persons, with "probation" used here in a general sense to describe penalties which involve the offender agreeing to comply with certain undertakings and being subject to a period of supervision. If the legal person breaches the conditions imposed, it may be brought back for resentencing.

66. In addition to the minimum requirement not to reoffend, probation conditions may be rehabilitative or remedial. Remedial conditions are aimed at repairing any harm caused by the commission of the offence. This may be particularly significant where the legal person has the resources and/or expertise to remedy particular harms. However, some conditions require the legal person to undertake work that is not related to the offence itself. While this may be a legitimate sanction, it must be remembered that, for a legal person, such conditions may simply be operating costs to be borne.

67. Another condition is rehabilitative, that is, requiring steps to be taken in order to ensure organizational change. These should generally be subject to the supervision of the court or regulator, and can represent an onerous intrusion into the operations of the organization. Nonetheless, they are potentially a powerful mechanism for achieving organizational change.

[13] For example, in 2007 Siemens AG was penalized a total of €201,000,000 for corrupt payments, consisting of a €1,000,000 fine and €200,000,000 in disgorgement of profits.

E. Disqualification

68. A legal person that has committed an offence can be disqualified or restrained from engaging in certain activities. Such sanctions are found in a number of jurisdictions and take a variety of forms, including:

(a) Disqualification or suspension of licences;

(b) Temporary or permanent suspension of activities or closure of premises;

(c) Suspension or termination of funding or being excluded from government contracts.

69. Although potentially a powerful deterrent sanction, as with other financial penalties, they may have significant secondary effects.

F. Dissolution

70. As a legal person is a creation of the law, it can also be dissolved by law. In some cases, the nature of the offence and the organization may be such that the legal person is dissolved, which would be the equivalent of capital punishment. While this may be appropriate for organizations that have no legitimate purpose, or small companies where the secondary impacts are minimal, in the case of legitimate organizations, the secondary impacts may be regarded as unacceptably high.

71. Dissolution may be brought about indirectly, for example, by imposing a fine that is so high that the company becomes insolvent. However, a number of jurisdictions specifically provide for an order that the organization be wound up or cease to engage in any further business activities.

72. In many jurisdictions, the nature of legal personality is such that dissolution may give rise to the problem of the "phoenix company"; that is, the same individuals form a new corporate entity which is able to continue business. It may therefore be necessary to consider related sanctions on individuals, such as disqualification of directors from being involved in future companies.

VII. Conclusion

73. Article 10 on the liability of legal persons is an important recognition of the role that legal persons may play in the commission or facilitation of transnational organized crime. Legal persons may facilitate the crimes of natural persons as well as committing offences in their own right. In order for legal persons to be made accountable for their involvement in transnational organized crime, States parties must ensure that appropriate models of liability are in place, supported by effective and proportionate sanctions.

74. Although the liability of legal persons for criminal conduct may be a relatively new concept, it is well-established in many jurisdictions. It is also required by a number of international instruments in addition to the Organized Crime Convention.

75. This background paper has sought to illustrate the challenges that arise in imposing liability on legal persons. It has discussed a number of responses, from a

variety of legal systems, that may be applied or adapted by States. Regardless of the form of liability adopted, there are a range of sanctions that may be imposed to ensure the effective accountability of legal persons. If supported by appropriate rules of investigation and procedure, the liability of legal persons can then be an important component of global efforts to combat transnational organized crime.